Chong Shao Fen & Anor v Mehrzad Nabavieh & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCVC-788 OF 2011
DARRYL GOON JC
19 JUNE 2018

Civil Procedure — Assessment of damages — Appeals — Assistant registrar allowed plaintiff's application for directions and a date of assessment of damages — Whether application was made out of time contrary to O 37 r 1(1) of the Rules of Court 2012 — Whether order of Court of Appeal upon which plaintiff's application for assessment of damages predicated had been complied with

This was the defendant's appeal against the decision of the assistant registrar in allowing the plaintiff's application for directions and a date for assessment of damages. Before the assistant registrar, the defendant submitted that: (a) the application for assessment of damages was made out of time contrary to O 37 r 1(1) of the Rules of Court 2012 ('the ROC'); and (b) the order of the Court of Appeal dated 12 January 2015 upon which the plaintiff's application for assessment of damages was predicated ('the order'), had not been complied with. The defendant maintained that the report of Ir Dr Gue See Sew ('Ir Dr Gue') must first be obtained before the plaintiff could proceed to assess damages.

Held, allowing the defendant's appeal and setting aside the decision of the learned assistant registrar with costs of RM3,000:

(1) The appointment of Ir Dr Gue was related to the issue of damages. Besides, para 5(a) of the order was a specific order by the Court of Appeal and it could not be ignored and rendered otiose by the parties. If the plaintiff wanted to proceed to have damages assessed in accordance with the order, the plaintiff must first comply with the order and secure the report of Ir Dr Gue. Otherwise the order in para 5(a) would be rendered futile. Ir Dr Gue's report would be relevant in assessing the damages suffered by the plaintiff. In view of the foregoing, the issue related to non-compliance of O 37 r 1(1) of the ROC did not arise (see paras 6 & 8).

[Bahasa Malaysia summary

Ini adalah rayuan defendan terhadap keputusan penolong pendaftar dalam membenarkan permohonan plaintif untuk arahan dan tarikh penaksiran ganti rugi. Di hadapan penolong pentaftar, defendan berhujah bahawa: (a) permohonan untuk penaksiran ganti rugi dibuat di luar masa bertentangan

kepada A 37 k 1(1) Kaedah-Kaedah Mahkamah 2012 ('KKM'); dan (b) perintah Mahkamah Rayuan bertarikh 12 Januari 2015 atas mana permohonan plaintif untuk penaksiran ganti rugi didasarkan ('perintah tersebut'), tidak dipatuhi. Defendan mengekalkan bahawa laporan Ir Dr Gue See Sew ('Ir Dr Gue') mesti diperolehi terlebih dahulu sebelum plaintif dapat meneruskan untuk menaksir ganti rugi.

Diputuskan, membenarkan rayuan defendan dan mengetepikan keputusan penolong pendaftar yang bijaksana dengan kos sebanyak RM3,000:

(1) Pelantikan Ir Dr Gue adalah berkaitan isu ganti rugi. Di samping itu, perenggan 5(a) perintah tersebut adalah perintah spesifik oleh Mahkamah Rayuan dan ia tidak boleh diketepikan dan membuatkan sia-sia oleh pihak-pihak. Jika plaintif hendak meneruskan untuk ganti rugi ditaksir mengikut perintah tersebut, plaintif mestilah mematuhi terlebih dahulu perintah tersebut dan mendapatkan laporan Ir Dr Gue. Jika tidak perintah dalam perenggan 5(a) akan membuatkan sia-sia. Laporan Ir Dr Gue adalah relevan dalam menaksirkan ganti rugi yang dialami oleh plaintif. Mengambil kira perkara di atas, isu yang berkaitan ketidakpatuhan A 37 k 1(1) KKM tidak berbangkit (lihat perenggan 6 & 8).]

Notes

For cases on appeals, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2268–2269.

Legislation referred to

Rules of Court 2012 O 37 r 1(1)

Chan Chow Wang (Sykt Chan Chow Wang) for the plaintiffs.
Pramjit Singh (Lim Biiang Haur with him) (JS Ling Diyana & Singh) for the defendants.

Darryl Goon JC:

[1] This is the plaintiff's appeal against the decision of the learned *timbalan pendaftar* of 17 April 2018 in allowing the plaintiff's application for directions and a date for assessment of damages.

[2] The defendant objected to the application before the *timbalan pendaftar*. Two reasons were advanced for the defendant's objection. The first is that the application for assessment of damages was made out of time. Contrary to O 37 r 1(1) of the Rules of Court 2012, the application for directions for assessment of damages was made well beyond one month from the date of the operative order. The second is that the order of the Court of Appeal of 12 January 2015

upon which the plaintiff's application for assessment of damages is predicated, has not been complied with.

[3] On 12 January 2015, the Court of Appeal in Civil Appeal No W-02NCVC(W)-1698–07 of 2013 and Civil Appeal No W-02NCVC(W)-1699–07 of 2013 ordered as follows:

PERINTAH

RAYUAN INI di tetapkan untuk perdengaran pada hari ini dalam kehadiran Pramjit Singh, peguam bagi pihak perayu-perayu dan T Gunaseelan, peguam bagi pihak responden-responden dalam Rayuan Sivil No W-02(NCVC)(W)-1698-07/2013 dan T Gunaseelan, peguam bagi pihak perayu-perayu dan Rizal Zulkeply, peguam bagi pihak responden-responden dalam Rayuan Sivil No W-02(NCVC)(W)-1699-07/2013 *DAN SETELAH MEMBACA* rekod rayuan dan kesemuanya yang difailkan di sini *DAN SETELAH MENDENGAR* hujahan pihak-pihak tersebut *MAKA ADALAH DENGAN SEBULAT SUARA DIPERINTAHKAN* bahawa:

1. Rayuan Sivil No W-02(NCVC)(W)-1698-07/2013 terhadap liabiliti ditolak;

2. Rayuan Sivil No W-02(NCVC)(W)-1699-07/2013 dibenarkan dan selanjutnya di perintahkan bahawa liability Merzad Nabavieh dan Noushin Goudazi adalah 30%, liabiliti Majestic United Sdn Bhd adalah 40% dan liabiliti Azman bin Teh (No K/P: 590816-01-5305) (berniaga di bawah nama dan gaya Perunding Trussmaju) adalah 30%;

3. Kos bagi kedua-dua rayuan diatas dan kos di Mahkamah Tinggi ditetapkan pada RM80,000.00 dan dibayar oleh Responden-Responden yang bertanggungjawab dalam imbangan liabiliti masing-masing.

4. Deposit-Deposit dikembalikan kepada Perayu-Perayu;

5. Perintah Mahkamah Tinggi berkenaan remedi-remedi diketepikan dan digantikan dengan perintah-perintah seperti berikut:

   (a) Ir Dr Gue See Sew dilantik dalam tempoh 14 hari dari tarikh ini untuk membuat satu kajian mengenai 'foundation' bagi rumah yang dikenali sebagai No 50, Jalan Taman Pantai, Bukit Pantai, 59100 Kuala Lumpur yang dipegang di bawah Geran No Hakmilik 2724, Lot 14960, Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur dan memberi pendapat dan arahan beliau untuk membaiki, sekiranya perlu, bagi membaiki 'foundation' rumah tersebut;

   (b) Responden-Responden yang bertanggungjawab membaiki rumah tersebut, jika perlu, dalam tempoh 3 bulan dari tarikh laporan disediakan oleh Ir Dr Gue See Sew.

   (c) Semua perbelanjaan bagi laporan Ir Gue See Sew dan semua kos untuk memperbaiki rumah tersebut ditanggung oleh

Responden-Responden yang bertanggungjawab dalam imbangan liabiliti mereka masing-masing;

(d) Sekiranya Responden-Responden yang bertanggungjawab gagal memperbaiki rumah tersebut, Perayu-perayu dalam Rayuan No W-2(NCVC)(W)-1699-07/2013, boleh memperbaiki rumah tersebut dan menuntut kos untuk memperbaiki rumah tersebut dari Responden-Responden yang bertanggungjawab dalam imbangan liabiliti mereka masing-masing;

6. Gantirugi ditaksirkan oleh Mahkamah Tinggi; dan

7. Pihak-pihak mempunyai kebebasan untuk memohon.

DIBERI di bawah tandatangan saya dan meterai Mahkamah pada 12 Januari 2015.

[4] It is common ground that para 5 of the Court of Appeal's said order has not been complied with. The defendant maintains that the obvious reason for para 5(a) of the Court of Appeal's order was to aid in the assessment of damages. This view is reinforced by para 5(b) of the said order. The report of Ir Dr Gue See Sew, maintains the defendant, must first be obtained before the plaintiff can proceed to assess damages. It is argued that Ir Dr Gue's report will clearly be relevant in the assessment of damages.

[5] The plaintiff however maintained that it does not want to secure any report from Ir Dr Gue and it is not obliged to do so. It is argued that the order of the Court of Appeal does not make it incumbent on the plaintiff to appoint Ir Dr Gue. The plaintiff maintains that its hand cannot be tied in this manner. If the defendant wishes to appoint Ir Dr Gue, the plaintiff states that the defendant may do so and the plaintiff has no objections.

[6] Having regard to the nature of the claim, and the order of the Court of Appeal, I agree with learned counsel for the defendant that the appointment of Ir Dr Gue is related to the issue of damages. Besides, para 5(a) is a specific order by the Court of Appeal and it cannot be ignored and rendered otiose by the parties. In my view, if the plaintiff wishes to proceed to have damages assessed in accordance with the order of the Court of Appeal, the plaintiff must first comply with the order and secure the report of Ir Dr Gue. Otherwise the order of the Court of Appeal in para 5(a) will be rendered futile. Ir Dr Gue's report will be relevant in assessing the damages suffered by the plaintiff.

[7] If for any reason the parties cannot or is not able to appoint Ir Dr Gue, the party intending to progress the matter further and to take advantage of the Court of Appeal's said order should apply to the Court of Appeal. This is why courts allow, and in this instance the Court of Appeal has allowed, for an order that the parties do have liberty to apply. This is found in para 7 of the Court of Appeal's order.

[8] As for the non-compliance with O 37 r 1(1) of the Rules of Court 2012, subject to justifiable grounds being given, the court has a discretion to extend time. However, in view of the foregoing, this issue does not arise and need not be dealt with.

[9] For the reasons given above, the defendant's appeal is allowed and the decision of the learned *timbalan pendaftar* is set aside. Costs of RM3,000 to the defendant.

Defendant's appeal allowed; decision of assistant registrar set aside with cost of RM3,000.

Reported by Dzulqarnain Ab Fatar